

1 BEFORE THE WESTERN WASHINGTON GROWTH MANAGEMENT HEARINGS BOARD

2 SKAGIT HILL RECYCLING, INC. AND SCOTT
3 WALDAL,

Case No. 09-2-0011

4 Petitioners,

**ORDER ON COUNTY'S MOTION TO
DISMISS**

5
6 v.

7 SKAGIT COUNTY AND SKAGIT COUNTY
8 COMMISSIONERS,

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10 Respondent.
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13 **THIS Matter** comes before the Board on the Dispositive Motion of Respondent Skagit
14 County filed June 3, 2009.¹ With its motion, Skagit County seeks dismissal of Skagit Hill
15 Recycling, Inc. and Scott Waldal's (Petitioners) Petition for Review (PFR). Petitioners filed a
16 response to the motion on June 15, 2009.² The County filed a reply brief on June 16, 2009
17 and Petitioners filed an additional response on June 22, 2009. The Board's rules do not
18 provide for the moving party to reply to a response brief. The moving party files their
19 opening brief, to which the non-moving party is entitled to respond. This Board has held on
20 numerous occasions that no further replies are expected or permitted by the Board.
21 Therefore, the County's reply brief and the Petitioner's response will not be considered part
22 of the record in this matter.
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25 A telephonic motion hearing to allow the parties to present oral argument was conducted on
26 June 30, 2009. Petitioner was represented by Mr. James Tupper. The County was
27 represented by Arne Denny. Board members Nina Carter, William Roehl and James
28 McNamara were present, with Ms. Carter presiding. Having reviewed the arguments of the
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¹ Skagit County's Dispositive Motion to Dismiss Petition for Review, filed June 3, 2009.

² Skagit Hill Recycling's Response to Skagit County's Motion to Dismiss, filed June 15, 2009.

1 parties and the Record herein, the Board DENIES the County's Dispositive Motion to
2 Dismiss the PFR.

3 4 DISCUSSION

5 Petitioners, Skagit Hill Recycling, Inc. and Scott Waldal, contest Skagit County's adoption of
6 Ordinance O20090002 which places a temporary moratorium on siting solid waste handling
7 facilities in certain zoning districts within the rural areas of Skagit County. Petitioners base
8 their PFR on an allegation that the County's action violates the Growth Management Act
9 (GMA) by precluding the siting of an essential public facility (EPF); something RCW
10 36.70A.200 specifically prohibits. Petitioners further contend the moratorium violates RCW
11 36.70A.070(5)(b) which requires the rural element of a comprehensive plan to allow for the
12 siting of EPFs. Petitioners also allege various violations of the GMA's goal, including RCW
13 36.70A.020(5), (7) and (11).³

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16 Skagit County's Motion seeks dismissal of the PFR for three reasons:⁴

- 17 1. The County complied with the GMA's requirements for adoption of a moratorium;
- 18 2. Petitioners lack both GMA participation standing as well as Administrative
- 19 Procedures Act (APA) standing;
- 20 3. Petitioners' issues are not ripe for review.

21 • Standing

22 Skagit County contends Petitioners do not have either GMA participation standing or APA
23 standing because their comments "did not apprise the county of the issues raised in the
24 PFR."⁵ The Board notes that the Petitioners, via Mr. Tupper, testified at the County
25 Commissioners' May 12, 2009 public hearing on the moratorium.⁶ Mr. Tupper stated that
26 his client's business was "consistent with the County's Solid Waste Comprehensive Plan
27 and the County's Plan for land use".⁷

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31 ³ See generally, Petition for Review, filed May 21, 2009.

32 ⁴ County's Motion to Dismiss, at 1.

⁵ County Motion, at 1 (GMA standing).

⁶ Petitioners' Exhibit H; County Exhibit 2.

⁷ County Exhibit 2, at 4.

1 It has long been held, by both the Courts and the Boards, that the GMA does not require
2 issue specific standing.⁸ Rather, the GMA requires only that a petitioner's participation
3 raise a subject or topic of concern or controversy which is reasonably related to the issues
4 presented for resolution to the Board.⁹ The County's minutes from the May 12, 2009 public
5 hearing clearly show Petitioners participated in matters related to the issues presented in
6 their PFR, namely the County's actions related to the moratorium and the siting of an EPF.
7 Therefore, the Board concludes there is an adequate showing of participation standing
8 under the GMA. Since the Board finds the Petitioners have GMA participation standing,
9 there is no need to address the County's contentions in regards to APA standing.¹⁰ The
10 County's Motion to Dismiss for Lack of Standing is DENIED.
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13 • **Moratorium**

14 Skagit County seeks dismissal of the PFR because it fails "to articulate grounds on which
15 the Hearings Board can assert jurisdiction."¹¹ The County contends it adopted a moratorium
16 in order "to maintain the status quo while the county addressed a conflict within the Skagit
17 County Unified Development Code ... relating to the permitting of solid waste facilities."¹²
18 The County notes that the Moratorium was adopted without public notice, but the required
19 public hearing was held within the 60 day required time period.¹³
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22 Skagit County points out that not only does RCW 36.70A.390 authorize moratoriums without
23 prior public notice but that the Central Puget Sound Growth Management Hearings Board
24 (Central Board) has indentified three instances when review of a moratorium may be
25 appropriate.¹⁴ The Central Board identified the following instances:¹⁵
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28 ⁸ *Wells v. Hearings Board*, 100 Wn. App. 656(2000); *Friends of Skagit County v. Skagit County*, Case No. 07-
29 2-0025c, FDO, at 11-13 (May 12, 2008).

30 ⁹ *Id.*

31 ¹⁰ *Thurston County v. WWGMHB*, 137 Wn.App. 781, 792 (2007) (A person need not meet the requirements of
32 APA standing to have participation standing before the Board).

¹¹ County Motion, at 5.

¹² County Motion, at 2.

¹³ County Motion, at 3.

¹⁴ County Motion, at 5-6.

- 1 1. Review is for compliance with the procedural requirements of RCW 36.70A.390.
- 2 2. Review is of the substantive provisions of the moratorium only if it has been
- 3 extended for a significant period of time so as to serve as a permanent regulation.
- 4 3. Moratorium is a blatant violation of the GMA.

5 The Western Board agrees with our colleagues at the Central Board that the listed
6 instances demonstrate appropriate circumstances for Board review of a moratorium.

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8 The Board notes it appears Petitioners' claim is not based on the first two instances. Skagit
9 County points out, and Petitioners do not dispute, the County complied with the procedural
10 requirements of RCW 36.70A.390. The County adopted the moratorium on March 23,
11 2009 and held a public hearing on May 12, 2009, within the 60 days required by the GMA.¹⁶
12 The Board also notes Ordinance 020090002 is the initial adoption of the County's temporary
13 moratorium on the siting of EPFs. Thus, unlike a situation where a moratorium has been
14 continued for many years,¹⁷ this action of the County has not been in place for such a
15 significant time so as to become a permanent regulation.
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18 However, despite the parties' statements that the Board can decide the merits of this case,
19 the Board is unable to determine at this point in time if the County has or has not "blatantly"
20 violated RCW 36.70A.200 – Essential Public Facilities or RCW 36.70A.070 – Rural Element,
21 because the Board has not benefited from full briefing on the issues .
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23 **Conclusion:** Although the GMA permits the County to adopt a moratorium, the Petitioners'
24 issue statements do not allege a violation in that regard; rather, Petitioners allege that the
25 moratorium precludes the siting of an EPF. This is a viable assertion which should be
26 addressed by the Board on the merits after full briefing to determine not only whether the
27 Petitioners' proposed operation is in fact an EPF but what preclusionary effect the
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30 ¹⁵ Skagit County cites to the Central Board's holding in *Phoenix Development v. Woodinville*, Case No. 07-3-
31 0029c, FDO at 21-22 (Oct. 12, 2007).

32 ¹⁶ Ordinance 020090002; County Exhibit 2 Minutes of May 12, 2009 Hearing.

¹⁷ See e.g. *Master Builders of King and Snohomish Counties v. Sammamish*, Central Puget Sound Board
Case No. 05-3-0030c, FDO (Aug. 4, 2005)(Holding that a moratorium that has been continued for six years
amounted to a permanent development regulation).

1 moratorium may have on Petitioners. Therefore, the County's Motion to Dismiss the PFR is
2 DENIED and the matter shall proceed to the Prehearing Conference.

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4 **ORDER**

5 Based upon a review of the record in this case and having considered oral argument, the
6 Board orders that Skagit County's Motion to Dismiss the PFR is DENIED.

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8 Dated this 20th day of July, 2009.

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Nina Carter, Board Member

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James McNamara, Board Member

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William Roehl, Board Member

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